

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION

In Re: Brian's Service Station                      AAD No. 93-015/GWE  
Estate of Mary Laudone  
Notice of Violation No. 3249

ORDER OF DISMISSAL

This matter is before the Hearing Officer on the Motion to Dismiss filed by the Oil Pollution and Underground Tank Program ("Division") on March 19, 1993. The Motion asserts that Respondent's request for hearing was untimely, and accordingly, AAD lacks jurisdiction to entertain the appeal.

A hearing was held on May 11, 1993 for the Respondent to show cause why the appeal should not be dismissed. The Hearing Officer who conducted said hearing is no longer with the Administrative Adjudication Division, and this matter was assigned to Hearing Officer Baffoni for a decision on said Motion.

Rule 16.00(d) of the Administrative Adjudication Division Rules provides:

When an AHO becomes incapacitated or unavailable to complete a hearing and/or render proposed findings of fact and conclusions of law, the hearings shall be completed and/or a recommended Decision shall be rendered by a substitute AHO appointed by the Chief Hearing Officer upon the record as herein defined.

This Hearing Officer contacted the Attorneys of Record for Division and Respondent via a telephone conference call to determine the status of this matter and to explore possible resolution of same. Both parties were also afforded an

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opportunity to present their views as to whether a hearing do novo should be conducted or if a decision should issue on the record. After consideration of arguments of Counsel, and a review of the file and the transcript of the hearing on the Motion, it is apparent that the decision should be made on the record. The hearing consisted solely of arguments of Counsel, and neither credibility of witnesses nor the weight to be given testimony is involved in the resolution of this matter.

In support of its Motion, the Division represented that Respondent received the Notice of Violation ("NOV") on February 12, 1993. The copy of the return receipt card for the certified letter from Division containing the NOV was not submitted with the Motion; however, it is undisputed that the NOV was received by Respondent on February 12, 1993. The request for hearing was filed with the Clerk on March 3, 1993. Respondent's Attorney acknowledged at the hearing that the NOV was received by Respondent on February 12, 1993 and that the request for hearing (although prior to his involvement) was filed nine (9) days late.

Rule 7.00 of the Administrative Adjudication Division Rules provides that any person having a right to request a hearing shall follow the procedures set forth in R.I.G.L. § 42-17.1-2(u), and that such requests shall be sent to the AAD.

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R.I.G.L. § 42-17.1-2(u)(1) specifically provides that if no written request for a hearing is made within ten (10) days of the service of the notice (of violation), the notice shall automatically become a compliance order.

The Administrative Adjudication Division ("AAD") and the Director have consistently ruled in prior matters that the ten-day appeal requirement is jurisdictional and absent a timely filing, AAD lacks jurisdiction to entertain the appeal. See Daryl Johnson, AAD No. 93-028/AHE; Edmund Guglielmi, AAD No. 93-040/IE: The AAD lacks jurisdiction in the instant matter since the appeal was not filed until nine (9) days after expiration of the appeal period.

Rule 8.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters states that a party opposing a Motion must file a written objection within seven (7) days, and provides that failure to file a written objection within the prescribed time period will be deemed a waiver of the objection. Respondent's objection was due March 29, 1993; however, no objection has been filed. Consequently, Respondent's objection is deemed waived. Edmund Guglielmi, AAD No. 93-040/IE and Frederic Dupuis Spotless Cleaners, AAD No. 91-001/AHE.

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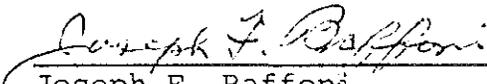
Based on the foregoing, it is hereby

ORDERED

1. That the within appeal is DISMISSED.

I recommend the foregoing to the Director for adoption as a final agency order.

Entered as an Administrative Order this 6<sup>th</sup> day of April, 1994.

  
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Joseph F. Baffoni  
Hearing Officer  
Administrative Adjudication Division  
Department of Environmental Management  
One Capitol Hill, Third Floor  
Providence, RI 02908  
(401) 277-1357

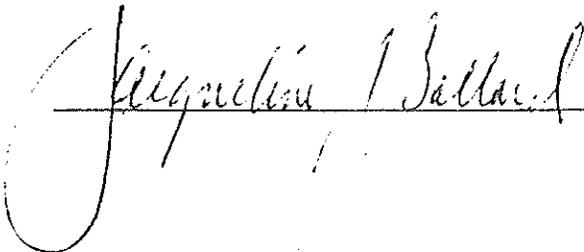
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I adopt the within Order of Dismissal this 8th day of  
April, 1994.

  
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Michael A. Annarummo  
Director  
Department of Environmental Management  
9 Hayes Street  
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within  
Order of Dismissal to be forwarded, via regular mail, postage  
prepaid to David W. Gervasini, Esq., 16 High Street, Westerly, RI  
02891 and via interoffice mail to Brian A. Wagner, Esq.,  
DEM/Office of Legal Services, 9 Hayes Street, Providence, RI  
02908 on this 11th day of April, 1994.

  
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